IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND.

JOHN A. COKE, JR., *v.* GORDON MOTOR CO., INC.

March 27, 1912.

Meredith & Cocke, and *Gregory & Boulware,* for plaintiff.
Haw & Haw, for defendant.

OPINION.

BEVERLEY T. CRUMP, J.: This was an action in assumpsit, which was tried at the July Term, 1911, of this court. On the trial, a verdict for $3,150 was returned in favor of the plaintiff on July 27th, 1911.

At the same term of court, the defendant made a motion to set aside the verdict, and grant a new trial, on the ground that the verdict was contrary to the law and the evidence; and this motion was continued by order of the court until the next term. The following term, viz: the September Term, of court, commenced on the 11th day of September, 1911. During that term, the distinguished judge of the court, Honorable John H. Ingram, died, on November 17, 1911. Under § 3127 of the Code, this did not cause the term to end, but, by force of this statute, it remained open. The present judge of the court, the successor of Judge Ingram, qualified on November 28, 1911, and entered upon the discharge of his judicial duties.

There is thus pending before the court, and the present judge, who succeeded Judge Ingram, this motion for a new trial unacted upon by the former judge. The questions arising out of this situation have been argued before the court. It is contended on the one hand that the court has, as at present constituted, the same powers, and the same judicial discretion to consider the motion for a new trial, and to grant or refuse it, as were possessed by the court, when presided over by Judge Ingram; as the evidence on the trial was taken down by a stenographer, and was written out, so that all the evidence may be produced for consideration by the present judge. It is contended, on the other hand, that the succeeding judge is without power to act upon the motion in any way, because under the statute and practice in Virginia, the successor to the trial judge cannot sign bills of exceptions for objections reversed during the course of the trial, nor sign a bill of exceptions containing the evidence, since he cannot certify the evidence, as is required under the practice in Virginia; and it is therefore contended that, no judgment having been rendered upon the verdict, no other action can be taken by the successor in office to

the trial judge than to set aside the verdict and direct a new trial of the issues in the case.

The question thus presented is one of considerable interest and has never been passed upon by the Court of Appeals of this state. Numerous authorities, pro and con, were cited by counsel in argument. These authorities will be found collated in a note in 2 L. R. A. (N. S.) 1000, and also in Notes to 10 Am. and Eng. Annotated Cases 327; and 7 Id. 493. There seems to be much apparent diversity of opinion, as to the power of the succeeding judge, under circumstances such as are here presented, and it is difficult to formulate any general principle from these decisions for the guidance of the court, because of the difference in the practice and procedure in the various States.

I find that one is apt to be misled by the later cases in some jurisdictions, in which it is stated apparently as a matter of settled practice that under the circumstances existing here the succeeding judge may consider and pass upon the motion for a new trial, with the same judicial power which was vested in the former judge, while investigation shows that the courts originally held otherwise, and the rule of practice so established by the earlier cases had in fact been changed by statute. Thus in Vermont it was originally held that the succeeding judge was obliged to order the verdict set aside, and to direct a new trial; but this ruling was changed by statute. In Johnson *v.* Smith, 2 L. R. A. (N. S.) 1000, the Vermont court had before it the question of whether a vested right existed in the former rule of practice, giving the right to a new trial in case of the death of the presiding judge, before signing a bill of exceptions, and it was held that no such right existed, but the Legislature might provide for the signing of bills of exceptions by the succeeding judge. In that case, the court says: "So no judgment had been entered upon the verdict, and no bill of exceptions taken by the plaintiff during the course of the trial had been signed. In these circumstances, as the law then stood, the plaintiff was without means of having the case reviewed in this court, and was, therefore, entitled to have the verdict set aside, and a new trial granted. See Nelson *v.* Marshall, 77 Vt. 44, and cases cited. But before the plaintiff took further action in the matter, Acts 1902, p. 44, No. 35, became effective. By this Act it is provided that in case of the decease of a judge of the Supreme Court, any judge of that court may allow or amend exceptions in a case tried by such deceased judge." It was therefore, held in Vermont, until changed by statute, that a new trial would be allowed as a matter of right. In Benson *v.* Hall, 197 Mass. 517, decided in 1908, the syllabus states as follows: "If the judge who presided at a trial dies, after a motion for a new

trial has been filed, but before it has been passed upon by him, the motion for a new trial is not to be granted, as a matter of right, by reason of the death of the judge before whom the case was tried, but, on the contrary another judge of the same court, at hearing on the motion, has the same discretionary power to grant or deny it that the deceased judge had." It appears from the opinion, however, that the Superior Court in which the case was tried was a tribunal consisting of three judges, who acted as trial judges in different cases, and the court held that the tribunal still survived, and that the two remaining judges were at all times clothed with the same powers as the deceased judge. I also find that in Massachusetts the surviving judges of the Superior Court are allowed by statute to sign bills of exceptions to points reserved upon a trial presided over by a judge of the tribunal, who subsequently died. Thus in Brooks *v.* Shaw, 197 Mass. 376, the court states incidently as follows: "The only provision for an allowance of exceptions by any other than the justice before whom they are taken, is in the case of disability, death, or resignation, as provided in R. L. 173, § 108."

The course of adjudication in Missouri on the question at issue is similar to that in Vermont. Thus in State *v.* Perkins, 139 Mo. 106, the court says: "Formerly an incoming judge's only course, when called upon to pass upon a motion for a new trial filed before his predecessor but undisposed of, was to grant such motion. Cocker *v.* Cocker, 56 Mo. 180; Woolfolk *v.* Tate, 25 Mo. 597. Since then, however, § 2171, Revised Statutes, 1889, has been passed, which enables an incoming judge to sign a bill of exceptions. This statute, in the light of prior practice, must be regarded as a remedial one and therefore to be liberally construed with a view to effectuate its manifest purpose. * * * We believe that the power to sign a bill of exceptions carries with it, as a coincident right, the right to pass upon the motions for new trials, without which in the case at bar the power to sign a bill of exceptions would be worthless and wholly ineffectual."

In Hume *v.* Bowie, 148 U. S. 245, the court, in the course of its opinion in a case from the Supreme Court of the District of Columbia, says: "Ordinarily where a party without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted." In Maloney *v.* Adsit, 175 U. S. 281, it appeared that the trial judge had resigned, and that the bill of exceptions was agreed upon by counsel, and signed by the succeeding judge. The Court held that this practice was not admissible under § 953 of the U. S. Revised Statutes, which section is as follows: "A bill of exceptions allowed in any cause shall be deemed

sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat at the trial of the cause, without any seal of the court or judge being annexed thereto." The court cites various cases, and adds: "The rationale of these cases evidently was that the court of errors could not consider a bill of exceptions that had not been signed by the judge who tried the case, and that such failure or omission could not be supplied by agreement of the parties, but that the only remedy was to be found in a motion for a new trial." The court also refers to Hume *v.* Bowie, *supra,* as deciding that where the trial judge died without settling a bill of exceptions, it was in order for a motion to be made to set aside the verdict and order a new trial, and that where such an order was made by the court in General Term, it was not a final judgment from which an appeal might be taken. The case of Maloney *v.* Adsit was decided in December, 1899, and in June, 1900, § 953 of Revised Statutes was amended by Congress so as to permit the succeeding judge of the court in which the cause was tried, if the evidence was taken down by a stenographer, to pass upon a motion for a new trial, and to sign bills of exceptions. This amended statute was brought to the attention of the court in Meldrum *v.* U. S., decided by the Circuit Court of Appeals, and reported in 151 Federal Reporter 177, and it was there held that under this statute, and the authorities cited, the succeeding judge had power to consider the motion for a new trial, and overrule the same. The case just mentioned is also reported in 10 Am. and Eng. Annotated Cases 324, and has a note appended to it. The case of Life Insurance Co. *v.* Wilson, 8 Peters 291, is sometimes referred to as having decided that, prior to the amendment of § 953, of Revised Statutes, the successor of the trial judge might consider and pass upon a motion for a new trial. There is some language used by the court in that case in a general way which seems to lend support to this view of the effect of that case. But upon a careful reading of the case, I do not think that the court intended so to hold, and the case is not referred to in Maloney *v.* Adsit as being in conflict with the ruling there made. The case in 8 Peters was on an application for a mandamus to compel the judge of a District Court of the United States in Louisiana to sign the judgment. It was shown that by the statute of Louisiana, and the rule adopted by the District Court, the judgment, without the sign manual of the judge of the court, could not be enforced, and that without the signature of the judge to the judgment no execution could issue on it. The court held that the signing of the judgment was a mere ministerial act, and the judge of the court at the time the judgment was to

be signed should attach his signature to it, without reference to the fact that the case had been tried before a preceding judge. It does not appear that a motion for a new trial had been made before the trial judge, and the court only says that the succeeding judge could entertain a motion for a new trial, if one was made before him. It must also be remembered that in the Federal Jurisdiction, the action of the trial court, upon a motion for a new trial based merely upon the insufficiency of the evidence, is not subject to review. See also Penn Mut., etc., Co. *v.* Ashe, 145 Fed. 593, 7 Am. Eng. Ann. Cases 491.

In Bass *v.* Swingley, 22 Pac. 714, the Supreme Court of Kansas held that where a motion for a new trial is based upon the ground, among others, that the verdict was not sustained by sufficient evidence, then the succeeding judge must perforce direct a new trial, as he could not act upon the motion intelligently without depriving one of the parties of the statutory right of appeal.

The rule established by the decisions in North Carolina is to the same effect. See Isler *v.* Haddock, 72 N. C. 119; State *v.* O'Kelly, 88 N. C. 609.

In West Virginia it was held in an early case, Ott *v.* McHenry, 2 W. Va. 73, that the succeeding judge had power to hear and determine a motion to set aside a verdict which had been made before his predecessor, and that in doing so, he may act upon the evidence, upon which the verdict was founded, precisely as a Chancellor would have done had relief been sought in that form; that the evidence before the jury at the trial might be ascertained from the notes of the trial judge, by a re-examination of the witnesses, by affidavits of counsel in the cause, or of others who heard and remembered it, or in any other way that might be lawful as in the proof of any other case. That case would seem to be directly in point on the issue before the court here, but I think its authority is weakened by the subsequent cases of Welty *v.* Campbell, 37 W. Va. 797, and Franklin *v.* Vandervent, 50 W. Va. 412. In any event, I think that case is opposed to the weight of authority in those states in which this matter is not regulated by statute; and such a method of ascertaining the entire evidence on both sides, adduced before the jury at the trial, can scarcely be said to be in conformity with our procedure in Virginia. It is true that in recent years the habit of having the testimony taken down by a stenographer in cases of any moment has become almost universal, so that evidence is thus preserved.

Many cases were referred to in argument, which hold that under the circumstances here existing the successor of the trial judge has full authority to act upon a motion for a new trial just as the trial judge might have done. These cases or certainly

most of them are cited in the notes to which reference has been made, and such a doctrine appears to be fully recognized at this time in California, Massachusetts, Missouri, Nebraska, Illinois, and other states. Reference has already been made to the reasons for the later rulings in Massachusetts and Missouri. In Nebraska, the statute provides for an official stenographer in the courts, who is required to furnish a transcript of the testimony, which thereby becomes a part of the record, so that the record appears to be complete at the time the verdict is rendered. State *v.* Goslin, 32 Nebr. 291. In Conway *v.* Smith Mercantile Co., 6 Wyo. 327, the court discusses at length the question of the powers of the succeeding judge to sign a bill of exceptions pertaining to a trial before a former judge, and holds that it may be done, because their statute allows the court as the judicial tribunal, and not merely the judge thereof, to sign bills of exceptions.

After quite a considerable examination of the authorities, my conclusion is that in the states in which the common law practice was adopted and in which this matter is not regulated by statute, the proper disposition for a succeeding judge to make of a case on the docket of his court, pending upon a motion for a new trial, is to direct a new trial as a matter of course; and that this rule should still be given effect in Virginia, as it has not been changed by a statute. In the states which hold otherwise, the rule seems generally to rest upon a statute providing for an official stenographer, who should transcribe the testimony as a part of the record in each case, or upon a statute allowing the successor to the trial judge to act upon the pending motion for a new trial, and to sign all bills of exceptions. The Illinois courts, however, seem to hold that independent of statutory authority in either of these matters, the succeeding judge should act upon the motion for a new trial, as in these days of stenography and other improvements the evidence and incidents upon the trial itself may be reproduced, so as to enable the succeeding judge to act upon the motion as intelligently as the trial judge himself. This question is discussed at length in People *v.* McConnell, 155 Ill. 192. In the note in 10 Am. and Eng. Annotated Cases, on page 328 the annotator says: "The Federal Statute Rev. Stat., § 953, 4 Fed. Ann. 594) as construed by the reported case, does not require the successor to the trial judge, even if a stenographic record is unavailable, to grant a new trial as a matter of course. His authority depends upon his opinion as to his ability to pass fairly and intelligently on the questions presented, and is, therefore, broad enough to include all the instances mentioned. This view corresponds substantially with the decisions of the State Courts. The only cases wherein the successor to the

trial judge is without discretion occur in jurisdiction in which he has no authority to sign bill of exceptions. If such a bill is presented, he is required to grant a new trial in order that the exceptant may not be deprived of his right to have the case reviewed by the appellate court."

The further question then presents itself, as to the right of the succeeding judge in Virginia to sign the bills of exceptions containing the evidence on the former trial, or to certify the evidence as is done in our practice. If the succeeding judge has no right to thus make up the record, so as to preserve the exceptions taken by the party against whom the verdict was rendered on the trial, he will be deprived of his right of appeal based upon those exceptions, and if such be the case, the succeeding judge should, as a matter of course, set aside the verdict and direct a new trial.

It is provided by statute in Virginia, Code, § 3127, that a pending term should not be ended by the death of the presiding judge, but we have no other material statute bearing upon the question at issue here. Our statute allowing the court to grant new trials is contained in § 3392, and has been in existence substantially in the present language for many years past. Our present statute as to bills of exceptions is found in § 3385; the 3rd volume of Pollard's Code, containing that section as amended in 1908.

It is there enacted that "In the trial of a case at law, in which an appeal, writ of error or supersedeas lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which, if the truth of the case be fairly stated therein, the judge shall sign, and it shall be a part of the record of the case. Any bills of exceptions may be tendered to the judge, and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or within thirty days after the end of such term, either in term time or in vacation, whether another term of the said court has intervened or not, or at such other time as the parties, by consent entered of record, may agree upon, and any bills of exceptions so tendered to and signed by the judge, as aforesaid, either in term time or in vacation, shall be a part of the record of the case." According to my interpretation of this language, while the exception is taken, of course, to the opinion of the court, yet the trial judge is required to sign the bills of exceptions. All authority to sign bills of exceptions in Virginia, is found in this statute, which must be strictly complied with, as shown by the decisions of our Court of Appeals referred to in Notes to Pollard's Code. In Colby *v.* Reams, 109 Va. 308, the court says: "The evidence is not a part of the record unless made so by a proper bill of exceptions. It is not a bill of excep-

tions and fails of its purpose, unless it is authenticated by the signature of the judge presiding at the trial. Code, § 3385, Blackwood Coal Co. *v.* James, 107 Va. 656." The purport of this statute is about the same as that of the original § 953, of Revised Statutes of the United States, which has been hereinabove transcribed. With reference to that statute, the Supreme Court says, in Maloney *v.* Adsit, *supra*: "We understand this enactment to mean, that no bill of exceptions can be deemed sufficiently authenticated, unless signed by the judge who sat at the trial, or by the presiding judge, if more than one sat." In Penn Mut. Life Ins. Co. *v.* Ashe, 145 Fed. 593, the Circuit Court of Appeals referring to Maloney *v.* Adsit, says: "Before the passage of the act of June 5, 1900, amending 953, it was the settled rule in the courts of the United States that the signing of the bill of exceptions is a judicial act which can only be performed by the judge who sat at the trial, or by the presiding judge if more than one sat."

In my opinion the same interpretation should be placed upon § 3385 of our Code; and, therefore, the present judge of this court has no right to attach his signature to bills of exceptions certifying to the evidence or the opinion of the court had upon the trial of this cause before his predecessor.

In a note on the subject of bill of exceptions, in 10 Va. Law Reg. 23-26, the annotator says, although without reference to the specific question before the court in this case: "Our trial judges may absent themselves, or from sickness, death or other unavoidable cause, be prevented from signing a bill within the prescribed time, but so far as we are advised, we have no statutory provision to meet the emergency, and thus prevent what may be a miscarriage of justice." See also Hot Springs, etc., Co. *v.* Revercomb, 110 Va. 240; Standard Peanut Co. *v.* Wilson, 110 Va. 650.

It is now the custom in Virginia, in the cities at least, for one or the other side in a case to have the testimony and the proceedings upon the trial taken down by a stenographer in the majority of cases involving amounts of any consequence, so that a complete reproduction of the testimony and a precise statement of all rulings of the court and exceptions noted are preserved. I do not think that this practice prevails so generally in the Circuit Courts in the counties, except in cases in which corporations are defendants. It might be advisable to have legislation in Virginia, authorizing a succeeding judge to authenticate the evidence and sign bills of exceptions pertaining to trials had before his predecessor, either generally or in all cases in which the proceedings were taken down by a stenographer. And it might be advisable to have legislation authorizing a judge succeeding the trial judge, in all cases to consider and

pass upon motions for a new trial, either made before the trial judge, or made before the succeeding judge, in cases in which judgment had not been entered upon the verdict. But in the absence of legislation of this character, I am constrained to the conclusion that in this case I am without power to call upon counsel to furnish me with a transcript of the testimony taken down by a stenographer, and, in the exercise of the judicial discretion which rests in the trial court to consider and pass upon the granting or refusal of the motion for a new trial; as by so doing, I would deprive one or the other of the parties of the right to have the proceedings at the former trial reviewed by the Appellate Court, since I am without authority to sign any bills of exceptions making up the record upon that trial.

For these reasons, my only course is to enter an order reciting that by reason of lack of authority in the present judge of the court to consider the motion for a new trial heretofore made before Judge Ingram, that motion stands granted as a matter of course, and the case must be placed upon the docket for another trial upon the issues joined.